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No. 73-1880

In the
Supreme Court of the United States
OCTOBER TERM, A.D. 1973

THE CHICAGO PATROLMEN'S ASSOCIATION, a Not-for-Profit Corporation, in Behalf of Various Members of the CHICAGO POLICE DEPARTMENT and RICHARD GAFFNEY, BERNARD B. O'REILLY and ROBERT A. ROSSI, Members of the Chicago Police Department,

Petitioners,

vs.

THE CITY OF CHICAGO, a Municipal Corporation, and DAVID STAHL, City Comptroller,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The City of Chicago, in its opposing Brief omits the important fact that on November 1, 1971, the Federal Pay Board issued an interpretation permitting restoration of longevity and related wage increases. This interpretation was issued prior to the Chicago City Council's passing

its appropriation ordinance for the year 1972. The City of Chicago also glosses over the fact that the trial court found that the 1972 City of Chicago appropriation ordinance as passed, in fact, contains an amount of appropriation sufficient to allow the payment of step and longevity increases to Chicago police officers. Both of these matters are correctly presented in the Petitioners' original Petition for Writ of Certiorari. These are important considerations and should be taken into account by this Honorable Court in passing on the Petition.

The Respondents correctly treat the Petition as invoking jurisdiction pursuant to 28 U.S.C., Section 1257(3), but incorrectly assert that this Honorable Court should not consider the Petition on jurisdictional grounds. It is the Petitioners' contention that the issues raised throughout the course of this litigation are not controlled by Illinois law but are issues of constitutional magnitude. Contrary to what Respondents would have this Court believe, Petitioners have raised these important and fundamental constitutional questions throughout the course of the litigation in this cause, beginning with their Motion for Summary Judgment filed with the trial court on April 24, 1973, which is set forth in full in Appendix A to this Brief.

The importance and substantiality of the questions presented have not been denied. The action of the City of Chicago and of the Illinois Courts in upholding impairment of contracts should not be permitted, particularly when such action concerns maintenance of a police force adequate to protect the rights of citizens. During the course of the proceedings, the validity of any State of Illinois statute or Chicago Municipal Ordinance which by its application by a State agency, government or court im-

pairs rights, privileges, or immunities raises a substantial federal question. See *Live Oak Water Users' Ass'n.* v. *Railroad Commission,* 269 U.S. 354 (1925); *Virginia* v. *Imperial Coal Sales Company,* 293 U.S. 15 (1934). In the instant case, the jurisdiction of this Honorable Court is claimed in that federal questions have arisen in the course of these proceedings from averments so distinct and positive as to place it beyond question that the Petitioner has at all times intended to assert a federal right. *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648 (1897). Even when interpreted in that light respondent acknowledges in its brief as proper, the failure of the Illinois Supreme Court to deal with the constitutionality of applying the statutes in question constitutes, at best, mere evasion of Petitioners' constitutional claims. *Rogers* v. *Alabama,* 192 U.S. 226 (1904).

It is the Petitioners' contention, as it has been throughout the course of the instant proceedings, that any "non-federal" questions raised by the instant dispute cannot be considered apart from the constitutional grounds which have been raised by Petitioners, and that the "non-federal" grounds are not adequate to support the judgment of the Illinois Supreme Court. In *Terminiello* v. *Chicago,* 337 U.S. 1, (1949), this Honorable Court held it could consider the constitutionality of an ordinance where it has been construed by the court in a constitutionally prohibited manner.

Two major questions are always implicit in every State court case brought to the United States Supreme Court where, as in the instant case, both federal and state issues are involved. The first question is whether the State court judgment is based exclusively upon a

non-federal ground. The second question is whether that non-federal ground is adequate to support the State court judgment. A third, and important related consideration is whether any non-federal ground upon which the State court judgment is purported to be based is constitutionally *tenable.* See *Staub* v. *Baxley,* 355 U.S. 313 (1958). Numerous decisions of the United States Supreme Court hold that matters before it will not be dismissed as alleging only non-federal grounds of decision where an ordinance on its face violates the federal constitution. *Konigsberg* v. *State Bar,* 353 U.S. 252 (1957). It is also to be remembered in the instant case that the Petitioners won a favorable judgment in the trial court, and the Illinois Supreme Court was the first court in which a judgment was rendered unfavorable to Petitioners. Petitioners have at no time abandoned their federal constitutional arguments. It is clear that the validity and construction of contracts through which governing bodies exercise constitutional functions, their consequence on the rights and obligations of the parties, and related matters all present questions of federal law not controlled by the law of any state where the state law which is attempted to be applied is constitutionally invalid. *United States* v. *Allegheny County,* 322 U.S. 174 (1944). See also *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958).

Where a state statute has been held valid under the federal constitution by its application, the granting of certiorari upon the basis of importance should depend upon this Honorable Court's impression of the correctness of the decision below and the novelty of the issues raised. *New York* v. *O'Neill,* 359 U.S. 1 (1959). In the instant case, the issues raised are important, and the decision of the Illinois Supreme Court incorrectly applies

state law and State of Illinois precedent to impair contracts and furthermore to deny Petitioners' rights to due process and equal protection of the laws. The Petitioners therefore, respectfully request this Honorable Court to grant certiorari.

Respondents' contention that the Fourth Point raised in the Petition was at no time raised in proceedings prior to the Petition for Writ of Certiorari to the United States Supreme Court can, by no stretch of the imagination, be a cause for this Honorable Court's refusal to consider that Point. Point IV., concerning the propriety of the Illinois Supreme Court's decision in light of Illinois summary judgment law, at no time arose prior to the action of the Illinois Supreme Court. The United States Supreme Court is the next recourse of review for Petitioners. The record, on its face, is an affirmative showing of this procedural deficiency. *Bailey* v. *Anderson*, 326 U.S. 203 (1945). The Petitioners could in no way anticipate that the Illinois Supreme Court would resort to a finding of fact contrary to the lower court's findings. This is one of those rare instances in which, following a surprise decision of the Illinois Supreme Court, a federal issue has been born and the federal question can be raised in no other way than through the papers addressed to the United States Supreme Court. At the least, Petitioners respectfully suggest that summary remandment is in order with regard to Point IV.

In light of the inability of the Respondents to face the issues presented in the Petition on their merits, without distorting them in an attempt to block on jurisdictional grounds this Honorable Court's consideration of the Petition, the need for plenary review of the action below is

indisputable. The Petitioners, therefore, urge this Honorable Court to grant their Writ.

Respectfully submitted,

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This participation of Lawrence Wolf Levin, Attorney at Law, in the preparation of this Reply is gratefully acknowledged.

APPENDIX

State of Illinois)
) SS.
County of Cook)

In The

CIRCUIT COURT COOK COUNTY

Illinois County Department - Chancery Division

The Chicago Patrolmen's Association A Not-For-Profit Corporation, in behalf of various members of the Chicago Police Department and Richard Gaffney, Bernard B. O'Reilly and Robert A. Rossi, members of the Chicago Police Department,

Plaintiffs,

vs.

The City of Chicago, a Municipal Corporation and David Stahl, City Comptroller,

Defendants.

No. 72 CH 436

MOTION FOR SUMMARY JUDGMENT

Now comes the Plaintiffs, The Chicago Patrolmen's Association, Police Officer Richard Garrney, Police Officer Bernard B. O'Reilly and Police Officer Robert A. Rossi by Williams and Leonard, Ltd. their attorneys and move this court to enter judgment in favor of the said Plaintiffs, in the above entitled cause.

STATEMENT OF FACTS

This is a case brought by individual members of the Chicago Police Department and the Chicago Patrolmen's Association on behalf of all members of the Chicago Police Department who were adversely affected by the 1971 wage price freeze and the resulting 1972 city budget. As a result of the President's action in August 1971, all scheduled longevity and step salary increases were frozen after August 14, 1971. On November 14, 1971 the Federal Pay Board issued an interpretation stating that longevity and automatic progression increases according to plans or established practices in existence prior to November 14, 1971 should be resumed. For many years members of the Chicago Police Department have been paid in accordance with annual ordinances passed by the City Council, said ordinances providing for various wage scales as covered under the Civil Service System. The ordinances have uniformly provided for automatic increases based on length of service as an employee of the Chicago Police Department, said increases known as step and longevity increases. The step increases came after six months, eighteen months, thirty months, and forty-two months on the job. The longevity increases came after a total of sixty months and one hundred twenty months on the job.

In December 1971 the City Council approved the 1972 city budget which eliminated all longevity and step increases freezing the respective grades as to where they were on December 31, 1971 and in addition providing for a percentage salary increase of from between five (5%) percent and five and one-half (5½%) percent for all the respective grades. The base to which this across the board increase was applied did not take into consideration any step or longevity increases which should have accrued

after August 14, 1971. Subsequently, the city provided for retroactive payments for the period August 14, 1971 through December 31, 1971, for those police officers who failed to receive their longevity or step increases during that period. However, the 1972 city budget though having provided for an across the board increase left those police officers at the same step or longevity classification as they had on August 14, 1971. Thus, all step and longevity increases accruing since August 14, 1971 have been lost at least through December 31, 1972, to the extent that future salary increases are determined by using a rate of pay that does not take into consideration those increases accruing between August 14, 1971 and December 31, 1972.

The Plaintiffs believe that judgment should be granted in their favor for the following reasons:

1. The Complaint, Motion to Dismiss, Answer, Interrogatories and Answers to those Interrogatories have already been filed with this Court.

2. The pleadings filed herein present no material issue of facts between the parties to prevent this Court from making a decision at this time.

3. That the Defendants have argued in their Motion to Dismiss and Answer that the relief the Plaintiffs seek can not be obtained because it has not been provided for in the Appropriation Ordinance for the City of Chicago for the year 1972.

4. The 1972 Appropriation Ordinance for the City of Chicago provided for $203,000,000 in police salaries. The amount of money spent for police salaries during 1972 was $191,000,000. There was $12,000,000 appropriated during 1972 for police salaries which was not spent during 1972.

One of the reasons for these excess funds was because a number of police officers for whom appropriations were made in 1972 either died, resigned, were suspended without pay, or were promoted by merit during 1972.

5. That the action by the City of Chicago in denying the Plaintiffs the step increases and longevity increases accruing to the Plaintiffs as a matter of right, said increases determined merely by the amount of time the Plaintiffs have been on the police force as determined by the calendar, represents an interference with Plaintiffs' contractual rights, said contractual rights protected under Article I, Section 10 of the Constitution of the United States of America.

6. The action of the City of Chicago in denying these increases represents a taking of property without due process of law within the meaning of the 14th Amendment to the Constitution of the United States of America.

7. The principles of promissorial estoppel and equitable estoppel should operate to prevent the Defendants from denying the Plaintiffs the step and longevity increases.

8. The relationship of the Plaintiffs and the City of Chicago is that of employee-employer under either expressed or implied contracts.

9. That the difference in treatment between those employees who already received their next step or longevity increase prior to August 14, 1971 and those employees who would have been entitled to those increases after August 14, 1971 represents a denial of equal protection of the law as provided for in the 14th Amendment to the Constitution of the United States of America, since all employees must be treated equally. Also, the difference

in treatment between those employees already employed prior to January 1, 1973 and those employed after January 1, 1973 represents a denial of equal protection of the law as provided for in the 14th Amendment, since those employed prior to January 1, 1973 have apparently accrued no additional time toward step or longevity increases between August 14, 1971 and January 1, 1973.

Wherefore, for the reasons stated, Plaintiffs pray that this Court enter a Summary Judgment in their favor and against the Defendants and for their costs and attorneys' fees in bringing this action.

The Chicago Patrolmen's Association
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Bernard B. O'Reilly and
Robert A. Rossi, Plaintiffs
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By: Robert F. Sharp
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CERTIFICATE OF SERVICE

Jane A. Costabile, being first duly sworn upon oath, deposes and says that she served the foregoing Motion for Summary Judgment by mailing a true and accurate copy of same to the following on the ..... day of ....., 1973·

Michael Small,
Assistant Corporation Counsel
Room 511 - City Hall
Chicago, Illinois 60602

/s/ Jane A. Costabile
Jane A. Costabile

Subscribed and sworn to before
me this ..... day of ....., 1973.
/s/ Illegible
Notary Public